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THE SPECIAL IMMIGRANT EXCEPTION FOR RELIGIOUS MINISTERS: AN ESTABLISHMENT CLAUSE ANALYSIS

Brent Baker

I. INTRODUCTION

For many people, the United States symbolizes justice, freedom and prosperity. Many foreigners are anxious to live in this "land of dreams fulfilled."[1] Immigration quotas, however, limit the number of persons who may attain resident status. Indeed, those that attempt to immigrate may be forced to wait great periods of time and suffer financial, emotional and physical hardship in their quest for resident status. There are some, however, who are fortunate enough to bypass these hardships. One group exempt from the numerical limitations are known as special immigrants.[2] Under the special immigrant exception certain alien ministers and religious immigrants may enter the United States with little difficulty.[3] Recently, the American public has experienced a heightened awareness and animosity toward immigration policy and governmental involvement in religious matters.[4] This situation may foment a first amendment challenge to section 1153 which grants preferred status to certain religious immigrants.[5]

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[1] H. D. DEUTSCH, GETTING INTO AMERICA–THE UNITED STATES VISA AND IMMIGRATION HANDBOOK, XV (1984).

[2] The term "special immigrant" is defined in 8 U.S.C. § 1101(2)(27).

[3] *See* 8 U.S.C. § 1151(a); 8 U.S.C. § 1101(a)(27)(C)(i); 8 U.S.C. § 1182(a)(14). Under these sections of the Act, the term "special immigrants" includes "an immigrant . . . who seeks to enter the United States solely for the purpose of carrying on the vocation of a minister of a religious denomination, and whose services are needed by such religious denomination having a bona fide organization in the United States." Thus, designated religious ministers, are exempt from the general numerical restrictions and labor certification requirements.

The variance in the immigrant experience is largely due to U.S. immigration policy which has been characterized as involving both qualitative and quantitative restrictions. F. AVERBACH & E. HARPER, IMMIGRATION LAWS OF THE UNITED STATES 4 (3d ed. 1975). If an alien falls within one of several preferential categories, they are assigned a number. This number corresponds with a certain entry date and is also subject to several other numerical criteria. For a list of the preferences see 8 U.S.C. 1101.

[4] *See* Golden, *Refugee Sanctuary: Churches Break The Law*, 12 IMMIGRATION NEWSLETTER 5 (1986).

[5] The religious immigrant exception might be subject to an Establishment Clause attack. Goldstein, *The Religious Path to Permanent Residence*, 10 IMMIGRATION L.J. 17 (1982).

Generally, the Establishment Clause[6] of the first amendment mandates that the government may neither establish a religion nor pass a law which "respects or leads in some way to establishment of a state religion."[7] The language of the amendment itself is "tantalizingly brief" and quite vague.[8] Accordingly, many different interpretations and applications have evolved. The Supreme Court has generally applied a three-pronged test known as the *Lemon* test to scrutinize a challenged federal enactment.[9] Recently, however, the Court has applied several other tests.[10]

Although it is unlikely that section 1153 would survive Establishment Clause scrutiny under the tests commonly used by the Court today, it should not be considered unconstitutional. The existing tests are based on the false notion that the framers of the Constitution sought absolute separation of Church and State. Historical evidence indicates that the type of evil that the framers sought to prevent by means of the Establishment Clause would not be created by the special immigrant exception for religious ministers.

This note will first apply the *Lemon* test and the more recent Supreme Court analysis to the religious immigrant exception in section 1153. Critical examination of each test will reveal a more acceptable analysis in light of relevant historical evidence.

II. Supreme Court Analysis

The Supreme Court's constitutional analysis of statutes under the Establishment Clause has been inconsistent. One commentator has suggested that "[t]he uninitiated observer who seeks to make sense out of the Supreme Court's Establishment Clause cases is in for a shock."[11] Nonetheless, in the majority of Establishment Clause decisions, the Court has applied the *Lemon* test.

A. *Evolution of the Lemon Test*

The Supreme Court first confronted an Establishment Clause challenge in *Everson v. Board of Education*.[12] The *Everson* Court declared that the first amendment erected a wall of separation between church and state.[13] The Court emphasized that the State is not only prohibited from favoring one religion over another, but also from favoring religion over non-religion. Many commentators argue that this interpretation of the Establishment Clause which requires a strict separation between church and state was incorrect and explains the Court's improper position today.[14]

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[6] U.S. Const. amend. I.

[7] Simpson, *The First Amendment and Religion*, 11 Cornell L.R. 2 (1985).

[8] *Id.*

[9] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[10] *See infra* note 75.

[11] Howard, Up Against the Wall: The Uneasy Separation of Church and State, In Church, State and Politics 5, 21 (J. Hersel ed. 1981). The reasons for this become apparent as the criticisms of each test are presented.

[12] 330 U.S. 1 (1947). This case involved the State reimbursing bus fare paid by parents of children attending parochial schools.

[13] *Id.* at 16.

[14] *See, e.g.*, Graham, *A Restatement of the Intended Meaning of the Establishment Clause in Relation to Religion and Education*, 1981 B.Y.U. L. Rev. 333; Smith, *Getting off on the Wrong Foot and Back on Again: A Re-examination of the History of the Religion Clauses of the First Amendment and a Critique of the*

In *Engle v. Vitale*,[15] the Court further stressed the importance of complete religious neutrality by finding a school directive that required daily recitation of a prayer unconstitutional. The fact that the prayer was non-denominational was not persuasive to the Court. This case further evidenced the Court's rigid view that the Establishment Clause mandated total separation.[16] Shortly thereafter, in *Abington School District v. Schempp*,[17] the Court held that recitation of the Lord's Prayer within the classroom violated the Establishment Clause. The Court's examination of the purpose and the primary effect of the challenged enactment formed the first two prongs of the *Lemon* test.[18] Finally, in *Walz v. Tax Commission*[19], a case challenging a religious tax exemption, the Supreme Court added a third prong to the *Lemon* test. The Court in *Walz* stated that the law in question must not produce excessive entanglement between government and religion.[20] *Lemon v. Kurtzman* combined the Establishment Clause analysis in these past decisions to create the three-pronged test generally used by the Court today.[21]

B. *Analysis of the Religious Immigrant Exception Using the Lemon Test*

In *Lemon*, the Court stated that the statute in question must "first have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally [it] must not foster excessive government entanglement with religion."[22] Applying the *Lemon* test to the special immigrant exception indicates that the exception is likely to be determined unconstitutional.

1. The Purpose Prong

A majority of the controversial court decisions involving Establishment Clause challenges to legislative enactments have occurred where there was an initial finding that the challenged statute did not have a secular legislative purpose.[23] To determine whether a statute has a secular legislative purpose, the Court first examines the enactment's legislative history. However, there are several factors which if present may prevent the Court from analyzing the legislative history.

In determining the intent or purpose of a federal statute, the "starting point must be the language employed by Congress."[24] The language of the religious immigrant

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Reynolds and Everson Decisions, 20 WAKE FOR. L. REV. 569, 572 (1984); *See infra* note 90 and accompanying discussion.

[15] 370 U.S. 421 (1962).

[16] *Id.* at 429–435. In addition, the Court expressed its concern with the public's reaction to government placing its stamp of approval on religious beliefs. *See also infra* note 50.

[17] 374 U.S. 203 (1963).

[18] *Id.* at 222.

[19] 397 U.S. 664 (1970) (Establishment clause challenge to religious tax exemption).

[20] *Id.* at 674.

[21] 403 U.S. at 612–613.

[22] *Id.*

[23] One commentator referred to the purpose prong as the "sine qua non" of the *Lemon* test. Pevar, *Public Schools Must Stop Having Christmas Assemblies*, 24 ST. LOUIS U.L.J. 327, 340 (1980). *See also* Note, *Student First Amendment Rights in the Public Setting: A Topic of Increased Litigation*, 6 A.J.T.A. 163, 169 (1982). For a recent Establishment Clause decision based on the purpose prong see Wallace v. Jaffree, 105 S. Ct. 2479 (1985).

[24] Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979). *See also* St. Petersburg Bank and Trust v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982).

exception is unambiguous as to its purpose.[25] The drafters used such words as "religious" and "minister" freely throughout the statute.[26] These words are also used frequently in the accompanying regulations.[27] This overt use of religious terminology within a statute has proven fatal in similar Establishment Clause challenges,[28] and could prove fatal to the religious immigrant exception.

In addition, statutory construction through the "plain meaning" rule may evidence an impermissible religious purpose behind the religious immigrant exception.[29] The "plain meaning rule" may completely prevent a court from analyzing the actual legislative history,[30] because when the statutory meaning is clear, no further judicial interpretation is required.[31] The religious immigrant exception is seemingly unambiguous as to its purpose and thus, might fall prey to the plain meaning rule. Furthermore, the fact that the provision requires the ministers' services to be "needed" by a religious organization in the United States might indicate a redeeming secular purpose.[32] Proponents of the provision might argue that it is intended to remedy a religious labor shortage in the United States. However, a provision already exists that enables entrance of immigrants who will remedy a labor shortage.[33] Because such religious immigrants are exempt under an existing labor preference, it follows that the special immigrant exception is merely superfluous and exists only as an aid to religion.

Nevertheless, in some circumstances, even where the Court finds that the statutory purpose and language are plain and unambiguous, the Court has considered the statute's legislative history to interpret the statute's language. As one commentator stated, "[i]t is still possible to dispute whether the legislature really meant what it so clearly expressed."[34]

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[25] The definition of the term "minister" evidences a religious purpose. 8 U.S.C. § 1101(a)(27)(C) defines "minister of religion" as

> an immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose of carrying on the vocation of minister of religious denomination, and whose services are needed by such religious denomination having a bona fide organization in the United States.

[26] *Id.*

[27] For example, 22 C.F.R. 42.25 states:

> . . . a person duly authorized by a recognized religious denomination having a bona fide organization in the United States to conduct religious worship, and to perform other duties usually performed by a regularly ordained pastor or clergyman of such denomination. The term shall not include a lay preacher not authorized to perform the duties usually performed by a regularly ordained pastor or clergyman of the denomination of which he is a member, and shall not include a nun, lay brother or cantor.

[28] Meltzer v. Board of Public Instruction of Orange City, 577 F.2d 311, 312 (5th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979).

[29] *See generally*, Rhodes & Ceereiter, *The Search for Intent: Aids to Statutory Construction in Florida–An Update*, 13 FLA. ST. U.L. REV. 485, 486 (1985).

[30] *Id. See also* MCCAFFREY *infra* note 44, at § 1(a).

[31] In the 9th Circuit, however, some courts suggest that it is mandatory to investigate legislative history when undertaking a statutory analysis regardless of the statutory language. Pettis *ex rel.* United States v. Morrison-Knudsen, 577 F.2d 668, 671 (9th Cir. 1978) ("It is always possible that Congress did not quite mean what it said and did not quite say what it meant.").

[32] 8 U.S.C. § 1101(a)(27)(C)(i).

[33] *Id.*

[34] Rhodes & Ceereiter, *supra* note 29, at 487. Recently, the Supreme Court, quoting Justice Frankfurter further stated that "the notion that because the words of a statute are plain, its meaning

Thus, even though the religious immigrant exception has a clear religious focus, the Court might investigate the legislative history of the exception.

An analysis of the legislative history surrounding the religious immigrant exception of the 1922 Federal Immigration Act is not particularly relevant or useful because most commentators consider the 1952 amendment to the Act as the first definitive immigration law in the United States.[35] The legislative history of the 1952 amendment to the Federal Immigration Act is replete with references to religious purpose and motivation.[36] As is the case with many federal statutes, the 1952 amendment is the culmination of a study by the United States government.[37] In 1947, the Senate authorized a study of the immigration and naturalization systems of the United States.[38] This two-year study, also known as the McCarran report, ended in 1950 and produced a 925-page document.[39]

The recommendations of such a study group are generally considered to be reliable evidence of legislative intent.[40] Within the McCarran report, there are numerous references supporting an accommodation of religion. Over five pages are dedicated to an explanation of the benefits the U.S. has received by providing a haven for religious fugitives.[41] In a section entitled "Religion as a Factor in Immigration," the report openly refers to the important role religion plays in shaping American culture.[42] Thus, the McCarran report provides evidence that the 1952 amendment was at least partially motivated by a desire to promote religion in general.[43]

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is also plain, is merely pernicious oversimplification." FBI v. Abramson, 456 U.S. 615, 625 n.7 (1982) (quoting United States v. Molina, 317 U.S. 424, 431 (1943) (Frankfurter, J. dissenting)).

[35] First, there is very little legislative history available regarding this provision. Second, in the 1922 Act, it was combined with the now abolished exception for professors. For an excellent discussion of the immigration laws and policies up to 1965, *see* AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES 4–17 (2d ed. 1961). *See also infra* note 41 and accompanying discussion; Note, *The Impact of Third Preference Status Professionals on Immigrants as Created by the 1965 Amendment to the Immigration and Nationality Act–Retraction of Expansion of Degree Equivalency*, 16 GA. J. INT'L & COMP. L. 311, 314 (1986) (Most scholars consider the 1952 amendment to be the first definitive immigration law in the U.S.). *See generally* HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY: 1798–1965 (1981).

[36] *See infra* note 42 and accompanying discussion.

[37] AUERBACH & HARPER, *supra* note 3, at 22.

[38] S. Rep. No. 137, 80th Cong., 1st Sess. (1947).

[39] S. Rep. No. 1515, 81st Cong., 2d Sess. (1950). The study was conducted by U.S. Senate Committee on the Judiciary under Senator McCarran of Nebraska and was titled, "The Immigration and Nationality Systems of the U.S." For a complete examination of this report see TRELLES & BAILEY, *infra* note 41.

[40] *See, e.g.*, Dickerson, *Statutory Interpretation: Dipping Into Legislative History*, 11 HOF. L. REV. 1125, 1130 (1983). Professor Dickerson suggests that recommendations of a study group may be the most reliable evidence of Legislative intent. The report is less likely to be altered after the fact than other types of Legislative records. *See also* H. LINDE & G. BUNN, LEGISLATIVE AND ADMINISTRATIVE PROCESSES 385 (1976). The McCarran report is even stronger evidence of Legislative intent because Senator McCarran was also the sponsor of the bill.

[41] TRELLES & BAILEY, IMMIGRATION AND NATIONALITY ACTS LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 229 (1979).

[42] *Id.* at 230. It is ironic that the report considered the very same factors that the original framers of the Constitution considered. 1 ANNALS OF CONG. 451 (J. Gales ed. 1789).

[43] The fact that Senator McCarran was also the sponsor of a bill might also support a finding of religious purpose. In *Wallace*, 105 S.Ct. at 2490, the statements of a sponsor of a bill were considered indicative of its religious purpose. If statements in this report are attributed to Senator McCarran, this may be strong evidence of religious motivation. This argument however, is quite tenuous and the Court may require further evidence.

In addition to documents generated in the legislative process, courts also examine the Act's historical context as an indicator of legislative intent.[44] The early 1950's were characterized by many occasions of "official godliness."[45] Although historical events may be far removed from the legislative halls, they are evidence that religious sentiment prevailed during the period in which the religious immigrant exception was enacted.

Examination of the relevant indicators of legislative intent reinforces the theory that the legislative purpose was to promote religion. Thus, the religious immigrant exception probably would fail the secular purpose element of the *Lemon* test. However, it is important to recognize the futility in attempting to determine the "actual" intent of any legislative body. The nature of the legislative process promotes contribution by people with many different motivations.[46] Many jurists and scholars agree that "[i]t is difficult or impossible for any court to determine the sole or dominant motivation behind the choices of a group of legislators."[47] Even when a federal enactment directly aids a particular religious sect, the government may have secular motives.[48] Legislators, being elected officials, have the "ballot box" motivating them to accommodate both religious and secular groups. A government may act because of various motivations, thus, the legislature may be incapable of acting with a single intent.

Furthermore, the Supreme Court is unclear about what portion of the legislative purpose is permitted to be religious.[49] The purpose prong has almost been reduced to mere rhetoric because the Court can attribute a secular or religious purpose to any legislation of which they approve or disapprove.[50] This permits the Justices to disguise

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[44] *E.g.*, F. MCCAFFREY, STATUTORY CONSTRUCTION § 33 (1953) ("Contemporaneous events may constitute an important extraneous aid to the construction of a statute.").

[45] BLANSHARD, GOD AND MAN IN WASHINGTON 21 (2d ed. 1960) For example, the new capital prayer room was established during this period. *Id.* In addition, during this era, the Presidential inauguration parade permitted a float entitled "God's Float" to begin the procession. *Id.* The float contained the motto "in God we trust" and "Freedom of Worship." It was essentially non-denominational but undeniably religious.

[46] Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L. J. 1205 (1969).

[47] Palmer v. Thompson, 403 U.S. 217, 224 (1970).

[48] *See generally*, Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 827 (1984). (For example, an atheistic ruler might well create an established church because he thinks it is a useful way of raising money or of ensuring that the clergy do not preach seditious doctrine).

[49] May v. Cooperman, 572 F. Supp. 1561 (D.C.N.J. 1983) (bona fide purpose); Beck v. McElrath, 548 F. Supp. 1161, 1163 (M.D. Tenn. 1982) (solely religious purpose); Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038, 1044 (5th Cir. 1982) (clearly religious).

[50] These judgments are frequently based on the court's evaluation of the public's perception of the opposed action. Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis* 58 N.Y.U.L. REV. 364, 382 (1983). *But see* Note, *Student First Amendment Rights in the Public School Setting: A Topic of Increased Litigation*, 6 A.J.T.A. 176 (1982). Consideration of the appearance of the proposed state action is not a new concept. In 1881, Oliver Wendell Holmes remarked that considerations of the community are "the very considerations which judges most rarely mention, and always with an apology." O. HOLMES, JR., THE COMMON LAW, 35 (Boston 1881). In *Wallace*, 105 S. Ct. at 2492, Justice Stewart also appears to be concerned with the public's perception of the statute. He looked at the statute to determine whether it conveyed a message of state endorsement of religion.

Recently, several lower courts have articulated this concern. A district court in New Mexico openly stressed the importance that public perception plays in its decision. The Court indicated that "if the public perceives the state to have approved a daily devotional exercise, the effect of the

the true basis of their decisions. For example, the Court held statutes prohibiting the teaching of evolution[51] and requiring the posting of the Ten Commandments in the classroom[52] unconstitutional because they have religious purposes. Yet, the Court found sufficient secular purposes to uphold statutes for religious tax exemptions,[53] display of a town nativity scene,[54] or making the National Mall available for a mass by Pope John Paul II.[55]

Notwithstanding the unclear signals from the Supreme Court and the difficulty in determining the actual motive of the legislators, the secular purpose prong is still an integral part of the predominantly used *Lemon* test. The religious statutory language, the religious statements in the legislative history, the historical context and the absence of a plausible secular purpose might render the religious immigrant exception unconstitutional.

2. The Effect Element

The second element of the *Lemon* test requires that the statute in question have a "principle or primary effect . . . that neither advances nor inhibits religion."[56] In the majority of the Establishment Clause cases, the challenged enactment results in some benefit to religion. Thus, the actual question is whether the principle or primary effect of the statute is to confer a benefit on religion. The only apparent effect of the religious immigrant exception would be to confer special benefits upon certain religious immigrants. In analyzing the effects elements the Court commonly weighs the beneficial secular effects found in prior similar cases against the beneficial effects on religion resulting from the questioned statute.[57] It is difficult to perceive that permitting thousands of ministers[58] to enter the United States could have any effect other than advancing religion.

However, the effects prong of the *Lemon* test is subject to vehement criticism. Many scholars agree that the effects test is incapable of consistent application.[59] Furthermore, requiring all legislative enactments to have a primary effect which does not advance religion would invalidate numerous practices that have long been accepted as constitutional.[60] Statutes providing for religious tax exemptions, Sunday closing laws, and those prohibiting consumption of alcoholic beverages or establishing adult theaters near

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states action is the advancement of religion." Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013 (D.C.N.M. 1983).

Essentially, when a statute is more likely to be perceived by the public as supportive of religion, courts are more apt to attribute a religious purpose to it.

[51] Epperson v. Arkansas, 393 U.S. 97, 103 (1968).

[52] Stone v. Graham, 449 U.S. 39, 40 (1980).

[53] *See supra* note 19.

[54] Lynch v. Donnelly, 465 U.S. 668 (1983).

[55] O'Hair v. Andrus, 613 F.2d 913 (3d Cir. 1980).

[56] *Lemon*, 403 U.S. at 602.

[57] *Lynch*, 465 U.S. at 678 (1984).

[58] Bulletin of U.S. Dept. of State, Bureau of Consular Affairs No-83 v. 5.

[59] *See, e.g.*, Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COL. L. REV. 1463, 1489 (1981).

[60] Cornelius, *Church and State–The Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality*, 16 ST. MARYS L. J. 1 (1984).

churches, clearly have a primary effect which benefits religion.[61] These statutes, however, consistently survive Establishment Clause scrutiny.

In addition, consider the benefit conferred upon religious institutions by enactments providing them with police, fire and health protection. These statutes, however, survive Establishment Clause scrutiny because they have both secular and religious effects. These statutes have a secular effect in that they protect the community at large while incidentally protecting Churches or religious beliefs. In contrast, the only effect of the religious immigrant exception is to facilitate the entrance of religious immigrants.

3. The Entanglement Prong

The third element of the tripartite *Lemon* test is the restriction against excessive entanglement between religion and government. Essentially, a statute fails this test and is unconstitutional if it "foster[s] excessive government entanglement with religion."[62] This element is intended to avoid situations where there is a risk that a regulation will inhibit or promote religious views.[63] The Court is particularly sensitive when the government becomes entangled in (1) classification of what is or is not an appropriate religion, form of religious worship or doctrine, or (2) when the government is forced into a continuous relationship involving surveillance or involvement for an unlimited period of time.[64] The religious immigrant exception augments government entanglement in both of these areas.

The Federal Immigration Statute requires that special religious immigrants be "minister[s] of a religious denomination [whose services are] . . . needed by [a] . . . religious denomination having a bona fide organization in the United States."[65] The statute, however, does not further define the phrase "minister of a religious denomination." An applicant attempting to fit within this exception applies directly to the U.S. Consulate. The appropriate Consulate official must then decide whether the individual is indeed a minister of a religious denomination. This naturally involves an evaluation of specific beliefs and practices of the individual by a government official which may be held as excessive government entanglement.

In 1982, the Supreme Court affirmed a Tenth Circuit Court of Appeals decision in *Rusk v. Espinosa*[66] and condemned an ordinance that created a similar entanglement situation. The questioned ordinance prohibited solicitation of donations without a permit but an exemption was provided for certain religious solicitations. The Court of Appeals found the enactment unconstitutional because a city official would be involved in the "continuing necessity for making judgments as to what is or is not religious."[67] Like the officials in *Rusk,* immigration officials under the religious immigrant exception must make objective determinations of the appropriateness and legitimacy of certain religious groups.[68] It is likely that this continual religious evaluation process would be viewed as

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[61] *Id.*

[62] *See supra* note 56, at 612–13.

[63] *See infra* note 71.

[64] Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations,* 41 WASH. & LEE L. REV. 347, 384 (1984).

[65] 8 U.S.C. § 1101(a)(27)(C)(i).

[66] 456 U.S. 951 (1982), *aff'd* 634 F.2d 477 (10th Cir. 1980).

[67] *Id.* at 481–82.

[68] *See supra* note 58.

creating excessive governmental entanglement.[69] In addition, such required religious evaluations may result in excessive litigation.[70] Litigation itself is a form of entanglement and may influence the court to more readily find the excessive entanglement necessary to prove the special immigrant exception in violation of the Establishment Clause.

Like the first two elements of the *Lemon* test, the entanglement element has also been criticized. Critics argue that the Court gives no guidance on how much government involvement rises to a level of entanglement.[71] Contemporary society is permeated with enactments which result in excessive entanglement between government and religion, yet they are rarely found unconstitutional.[72] Chief Justice Rehnquist argues that the entanglement prong often creates an "insoluble paradox."[73] For example, the Court requires aid to parochial schools to be closely monitored to avoid sectarian use, yet this same close supervision may result in entanglement.[74] This reasoning could be applied to the special immigrant exception.

An analysis using the three elements of the *Lemon* test indicates that the special immigrant exception would be held unconstitutional under its application.

C. *Other Constitutional Tests Applied by the Court*

Although the Court predominantly applies the three-part *Lemon* test, occasionally the Court uses other constitutional tests.[75] Rather than use the *Lemon* test, the Court has either applied "strict scrutiny" or a historical approach to determine the constitutionality of an enactment.[76] The religious immigrant exception would probably fail the strict scrutiny test. It might, however, be found constitutional through historical anaylsis.

Under strict scrutiny, the Court would examine a law to determine if it is facially religious. If it were facially religious, the law would be subject to strict scrutiny and would violate the Establishment Clause unless a compelling government need existed.[77] Thus, a court examining the language of the religious immigrant exception, would find it facially religious. This alone would not render it unconstitutional. The statute could be redeemed if a compelling governmental need were involved. It is difficult to conceive of any compelling governmental need to permit ministers to enter the United States without numerical restriction. Even if there were a religious labor shortage, these reli-

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[69] Note, *Government Non-Involvement with Religious Institutions*, 59 TEX. L. REV. 921, 939 (1981). *See also supra* note 64, at 936.

[70] *See, e.g.*, Matter of M, 1 I. & N. Dec, 147 (BIA-1941); Matter of B, 3 I. & N. Dec. 162 (CO-1948); Matter of N, 5 I. & N. Dec. 173 (CO)-1953); Matter of Z, 5 I. & N. Dec. 700 (CO-1954); Matter of Sinha, 10 I. & N. Dec. 758 (RC-1964); Matter of Rhee, 16 I. & N. Dec. 607 (BIA-1978); Matter of Varughese, I.D. 2797 (BIA-1980). However, in *Lynch*, 465 U.S. at 698, the Court stated that "[a] litigant cannot, by the very act of commencing a lawsuit, . . . create the appearance of divisiveness and then exploit it as evidence of entanglement."

[71] *See generally*, Ripple, *The Entanglment Test of The Religion Clauses–A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195 (1980); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of The First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1978–1979).

[72] *See supra* note 60 and accompanying discussion.

[73] *Wallace*, 105 S.Ct. at 2508 (1985) (Rehnquist, J., dissenting).

[74] *Id.*

[75] Marsh v. Chambers, 463 U.S. 783 (1983) (historical analysis); Larson v. Valente, 456 U.S. 228 (1983) (strict scrutiny).

[76] *Id.*

[77] *Larson*, 456 U.S. at 228 (1983).

gious workers would be exempt from the numerical restrictions through an alternative provision in the Federal Immigration Act.[78]

Using a historical analysis, the Court will uphold a statute or practice based on an evaluation of the length of time the challenged statute or practice has been accepted.[79] For example, statutes providing for prayer in legislative chambers and religious tax exemptions have been upheld because "an unbroken practice . . . is not something to be lightly cast aside."[80] Few practices can claim more continuous application or usage than that of providing special status to religious immigrants. The religious immigrant exception had its origins in the immigration laws of 1921.[81] Comparing the religious immigrant exception to other practices which the Court has held unconstitutional, the historical approach test indicates that the exception would not violate the Establishment Clause.

D. *Federal Power and Limited Judicial Review*

In analyzing the religious immigrant exception under these tests, the Supreme Court would have to consider that the enactment of the statute was an exercise of federal power.[82] Although the Court obviously has the power to declare acts of the government unconstitutional,[83] it might be more lenient in its review of federal legislation. The Court will review congressional acts only to determine if they reasonably relate to a constitutional grant of power.[84] The first immigration statute enacted by the federal government was upheld as a regulation of foreign commerce.[85] Since then, the Court has had no difficulty in finding sufficient constitutional authority to permit congressional regulation of the flow of immigrants.[86] Some scholars argue that "if the Constitution cannot prevent Congress from excluding whomever it may choose, it cannot prevent Congress from admitting whomever it may choose to admit either."[87] However, a constitutional challenge to the special immigrant exception under the Establishment Clause would not be a challenge to congressional power to regulate immigration.

III. The Inaccurate Foundation of Contemporary Establishment Clause Tests

The religious immigrant exception is likely to fail most constitutional tests currently applied by the Court. These tests, however, have been criticized by both jurists and scholars.[88] What is needed is a more consistent, and better reasoned method of constitutional analysis than that provided by the *Lemon* test. If the Court had greater fidelity

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[78] *See* Deutsch, *supra* note 1, at 118; *See supra* note 33 and accompanying discussion.

[79] *Lynch*, 465 U.S. at 678.

[80] *Marsh*, 463 U.S. at 790 (quoting *Walz*, 397 U.S. at 678 (1970)).

[81] Gordon & Rosenfeld, Immigration Law & Procedure 1A (1985). *See generally* Hoskins, *The Original Separation of Church and State in America*, 2 J. L. & Rel. 221 (1984).

[82] Nowak, Constitutional Law, ch.3, part 2, (2d ed. 1983).

[83] *Id.*

[84] *Id.*

[85] The Head Money Cases, 12 U.S. 580 (1884).

[86] The power to regulate immigration has been implied from the power to regulate foreign commerce, to declare war, to make treaties, to establish a uniform rule of naturalization, to prohibit the importation of persons, and to make all necessary and proper laws. *See* Gordon & Rosenfeld, *supra* note 81, at 1–3, 1.5.

[87] *See supra* note 5.

[88] *See* Smith, *supra* note 14. *See also* Note, *The Supreme Court and Religion: Historical Overview and Future Prognosis*, 24 St. Louis U. L. Rev. 183 (1980).

to the history surrounding the framing and adoption of the Establishment Clause, its analysis would be more consistent.[89] Furthermore, the religious immigrant exception would not be found unconstitutional if the historical underpinnings of the first amendment were given more consideration.

The founding fathers were undoubtedly concerned with protecting religious freedom.[90] They did not, however, adhere to a theory of rigid separation. The Supreme Court, by adopting a strict separationist approach in its early decisions, has built its Establishment Clause doctrine upon a "mistaken understanding of constitutional history."[91] The founding fathers intended the Establishment Clause only to prohibit the federal government from establishing a national religion and to prevent the federal government from favoring one religious sect over another.[92] The familiar "wall of separation" metaphor that was borrowed by the Court from Thomas Jefferson in *Everson* is misleading.[93] Neither Jefferson, nor the majority of the framers favored complete separation. They saw church and state in a kind of "parallelism, with neither subordinate to the other."[94] The historical record is replete with evidence that Madison, Jefferson and the rest of the framers intended only to prohibit the establishment of a national, oppressive church.[95] They were not seeking to prevent any aid or support of religion in general.

Thus, Jefferson's wall of separation metaphor was wrongly adopted by the Supreme Court. In *Everson*, the Court held that the government was precluded from directly assisting or interfering with any or all religion.[96] The Court felt that any enactment which promoted religion over non-religion would violate the Establishment Clause.[97] The Supreme Court, by failing to consider Jefferson's statement in context, lost sight of the framer's goals. If the Court considers the religious immigrant exception in light of

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[89] Whether the Court should or should not recognize the Framers' intent and quide its decisions accordingly, is a topic which itself would require a separate paper. This analysis proceeds on the assumption that the framers' intent should be considered. For additional discussion of this issue, see Maltz, *Some New Thoughts On An Old Problem–The Role Of the Intent Of The Framers In Constitutional Theory*, 63 B.U.L. REV. 811, 812 (1983).

[90] Most scholars agree that in the original thirteen colonies there was religious freedom and diversity. *See e.g.*, A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 7–9, 11–17 (1964). *But see* HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY: 1795–1965, 389 (1981).

[91] *Wallace*, 105 S. Ct. at 2508 (Rehnquist, J., dissenting).

[92] *Id.* at 2509. *See generally* Note, *Toward a Uniform Valuation of the Religious Guarantees*, 80 YALE L. J. 77, 85 (1970). The Supreme Court itself has on occassion hinted that they percieve the framers' intent as being to "foreclose the establishment of a state religion familiar in other 18th century systems." Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122 (1982).

[93] *Everson*, 330 U.S. 1 (1947). Metaphors in general are dangerous. *See Wallace*, 105 S. Ct. at 2509.

[94] DERR, THE FIRST AMENDMENT AS A GUIDE TO CHURCH–STATE RELATIONS: THEOLOGICAL ILLUSIONS, CULTURAL FANTASIES, AND LEGAL PRACTICALITIES, CHURCH, STATE AND POLITICS (J. Hensel ed. 1981). *See* Smith, *supra* note 14, at 606. Madison's initial proposal of the Bill of Rights included a provision indicating that one of its purposes was to prevent a nationally oppressive religion. *See also* Hersman, *Lynch v. Donnelly: Has the Lemon Test Soured?* 19 LOY. L.A. L. REV. 133, 137 (1985).

[95] Hersman, *supra* note 94, at 136. *See also* Smith *supra*, note 14, at 591, 606.

[96] *See Everson*, 330 U.S. at 1.

[97] Besides being contrary to the framers' intent, this also fails to consider the balancing effect of the Free Exercise clause. *See* Smith, *supra* note 14, at 642, 643. *See also* Anastaplo, *The Religion Clauses of the First Amendment*, 11 MEM. ST. L. REV. 151 (1981).

the original intent of the framers, it would be held constitutional. The exception does not promote any single religion nor does it aid in the process of establishing a national religion. Rather, by providing easier access to ministers of many religious organizations, the exception favors religious diversity and freedom.

America has grown strong because of its religious diversity and freedom of religious belief. These attributes are supported by America's favorable policy toward religious immigrants and "this great source of our strength, should not be choked off by holding the special immigrant exception unconstitutional."[98] The Court should evaluate the special immigrant exception under the Establishment Clause by considering its purpose as dictated by the framers of the Constitution: to protect religious freedom.

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[98] *See supra* note 45.